SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 651

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

REPLY BRIEF OF PETITIONER

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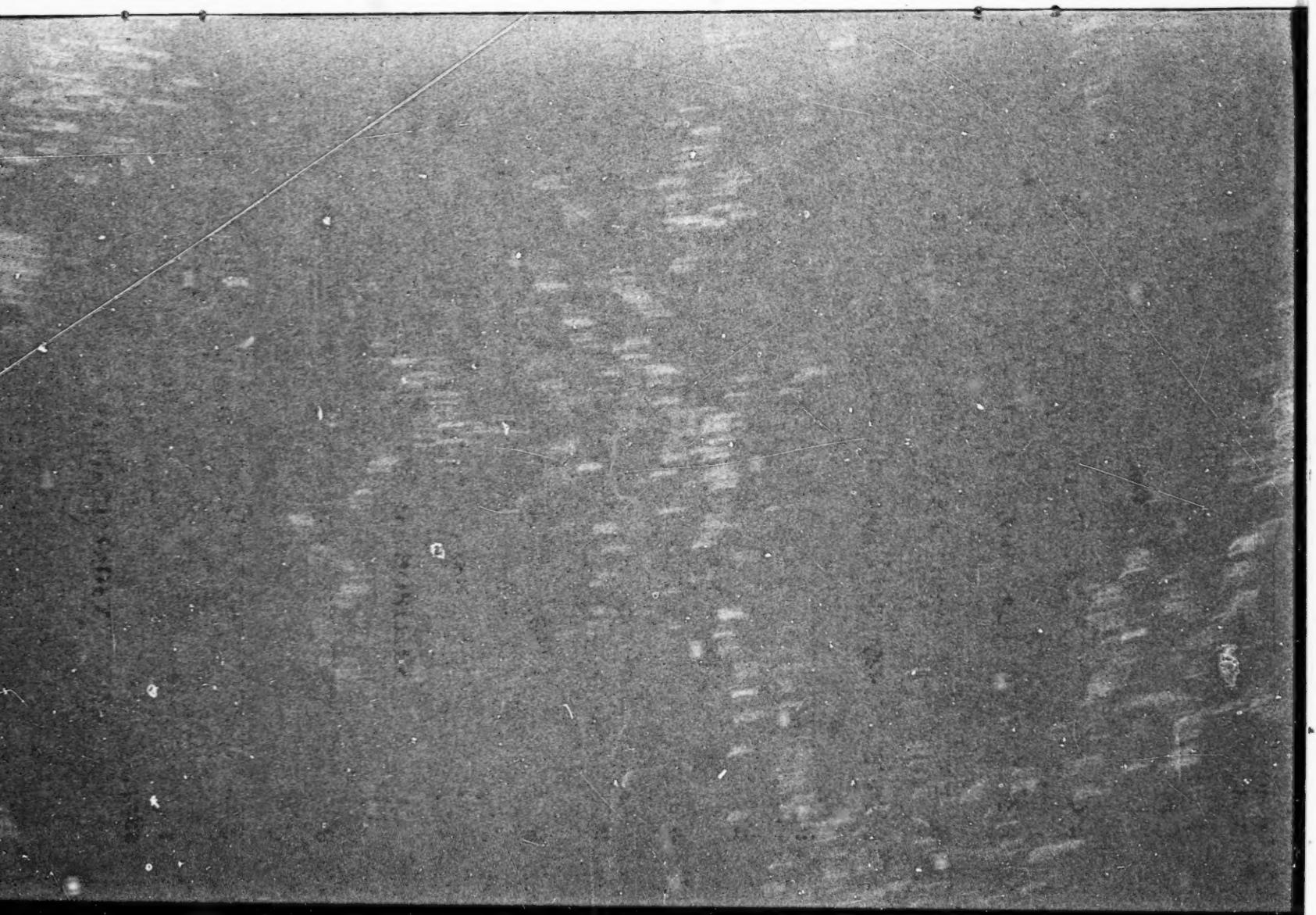

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ARGUMENT IN REPLY

The principal question relied upon by Petitioners to support their application for a writ of certiorari was whether *as a constitutional matter* a magistrate issuing a search warrant must make some form of contemporaneous record of the evidence produced to show probable cause, so that later when the warrant is challenged meaningful review can be had of the adequacy of the proof relied on by the magistrate. Analysis of the authorities produced by the Respondent demonstrates that the issue is one of great and pressing concern to state as well as federal courts and that a constitutional hiatus is rapidly develop-

ing concerning what procedural safeguards are inherent in the Fourth Amendment requirement of probable cause.

Because Respondent's analysis of several recent cases is deficient in many respects this additional reply brief is submitted to call attention to the need for an answer by the United States Supreme Court to this question.

1. State Decisions

Historically, the identical issue here raised was resolved by the Wisconsin Supreme Court in 1928 in *Glodowski v. State*, 196 Wis. 265, 220 N.W. 227 (1928), quoted at length in the Petition for a Writ of Certiorari, p. 9. The state constitutional provision there involved was virtually identical to the Fourth Amendment, and the decision held, as Petitioners here contend, that some form of contemporaneous record must be made of the proof relied on to show probable cause, so that adequate review could be obtained later.

Probably because most states require by statute that the proof in support of a search warrant be reduced to writing, the issue seems to have been dormant for many years.

Since the *Mapp* decision, however, several state courts have rendered decisions touching on one phase or another of this issue, culminating in the present case and its companion decision, *State v. Walcott*, 74 W.D.2d 156, 435 P.2d 994 (1967), which came to the precisely opposite conclusion of the *Glodowski* case. The dispositive language of the *Walcott* decision, as the Petition for a Writ of Certiorari in this proceeding points out, was incorporated in the present decision, and held that it was

not constitutionally necessary to record the evidence relied on to obtain a search warrant.

The *Walcott* decision was in turn based in large part on *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). Examination of that case discloses that the precise issue there involved was not the same. The issue there presented was whether a warrant could be issued without a written affidavit signed by the officer seeking it, and the Washington Supreme Court held that under the Fourth Amendment the proof could be presented orally. The issue was *not raised* of whether oral testimony, if relied on, must be somehow contemporaneously recorded so a later review could be obtained. What the Washington Supreme Court has done is thus to first conclude in *Malbeck* that oral testimony may be utilized, and then in *Walcott* proceed to the *non sequitur* that since it may be utilized it need not be recorded.

As Respondent points out in its brief the *Walcott* decision has recently been seized up by the dissenters in a recent Utah case, *State v. Jasso*, 21 Utah 2d 24, 439 P. 2d 844 (April 1968), to justify their conclusion that oral testimony need not be recorded, in spite of a statute (as most states have) requiring the magistrate to reduce oral testimony to writing. By the narrowest of margins (the vote was 3-2) the *Jasso* dissent failed to move the *Malbeck-Walcott* concept one step further and hold that in spite of the statute, which all conceded was designed to implement a constitutional provision identical to the Fourth Amendment, no record need be made.

This dissent is particularly interesting in terms of whether certiorari should be granted here, because it points

the way, as the Petition for a Writ of Certiorari predicted, to the future avoidance of *Mapp* by state courts. To get around *Mapp*, the dissenters say in essence, search warrants should be obtainable on oral unrecorded testimony as to probable cause. If this is constitutional (and the dissenters rely on *Malbeck* and *Walcott* to support such a view) then "probable cause" as a constitutional requirement loses its sting. Though not quoted by Respondent the following is the heart of the *Jasso* dissent:

> "... to punish the public by allowing a guilty defendant to go scot-free simply because of a technical violation of the law is a concept which should appeal only to criminally-oriented minds. There could have been no question in the minds of the majority of this court but what the trial court correctly refused to suppress this evidence were it not for the case of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081, decided in 1961. There a guilty defendant was freed by a decision of the Supreme Court of the United States on the ground that evidence was obtained without a search warrant in violation of her constitutional rights. In the instant case all constitutional safeguards were complied with, and even the United States Supreme Court would not reverse it. However, the majority of this court seems to be running scared, and instead of recognizing that the *Mapp* case was erroneously decided, they extend the concept to an unnecessary length in order to free a guilty dope peddler from a deserved conviction. Of course, we all recognize that the *Mapp* case, even though wrong in principle, is binding upon state courts. Still we should not go further than to say that evidence obtained in violation of a defendant's constitutional rights should be suppressed, for that is all the *Mapp* case said. The constitutional right is only to have a warrant issued 'upon probable cause supported by oath or affirmation, particularly describing

> the place to be searched, and the . . . things to be seized.' In this case that was done.
>
> • • •
>
> "Under the circumstances of this case I do not think a criminal in possession of a narcotic drug can complain of a loss of his constitutional right in order to escape the penalty of the law merely because there was a delay in reducing the oral testimony to writing. Not only was there probable cause to induce the magistrate to believe that there was marijuana in the residence of the defendant, there actually was a great quantity in that residence.
>
> "It is high time that courts stop being so overzealous of the rights of criminals and begin to be cognizant of the rights of the long-suffering, decent citizenry of this country." 439 P.2d at 847.

The invitation to police and prosecutors is clear—don't write down your proof of probable cause, because it may be constitutionally inadequate. Instead present sworn but unrecorded testimony, and *Mapp* can be avoided since there is no constitutional right to a review of the record made when the warrant issued.

2. Federal Decisions

Respondent relies on *United States v. Myers*, 270 F. Supp. 734 (E.D. Penn. 1967). Like *Malbeck*, it does not appear that the precise issue was presented as to whether or not as a *constitutional* matter oral testimony, if utilized to prove probable cause, must be recorded somehow. Rather, the issue there seems to have been cast in terms of whether oral testimony could be presented at all. This view is supported by the citations to federal cases in support of the holding that oral testimony can be utilized:

Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966)

does not discuss the procedural question of whether oral testimony must be recorded.

Gillespie relies on *Miller v. Sigler,* 353 F.2d 424 (8th Cir. 1965) Cert. den. 384 U.S. 980, also relied on in the *Myers* case. Again, there is no discussion of whether defendant had a constitutional right to have the proof of probable cause recorded.

Sparks v. United States, 90 F.2d 61 (6th Cir. 1937) is to the same effect.

The *Myers* case does, however, also cite a Pennsylvania decision, *Commonwealth v. Crowley,* 209 Pa. Super. 70, 223 A.2d 885 (1966), which, in discussing *Aguilar,* does say: "The (U.S. Supreme) Court does not say that the Fourth Amendment requires that the sworn facts be reduced to writing, but only that they be presented under oath or affirmation," 223 A.2d 889. This offhand disposition of the issue is the only reference in any of the Federal decisions relied upon which even approaches a discussion of the issue here sought to be raised.

CONCLUSION

In summary, analysis of the Respondent's brief discloses the following:

a. Apart from the present case, the only decisions which discuss in detail and weigh the merits of opposing arguments on whether oral testimony of probable cause must be constitutionally recorded are the *Glodowski* case in Wisconsin, holding it must be, and the dissenters' opinion in the *Jasso* case in Utah, denying such requirement. The *Crowley* decision from Pennsylvania denying

the claim of constitutional right should be considered here also.

b. Most cases touching on the issue, both federal and state, fail to distinguish between the right of the authorities to present oral testimony and the duty to record it so review may be had on the record.

c. In recent years the right to present oral testimony is assumed to carry with it no constitutional duty to record the testimony, and this devise is being used to avoid the implications of *Mapp*.

Respectfully submitted,

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